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No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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JEANNE WOODFORD, Warden, *Petitioner*,

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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JEANNE WOODFORD, Warden, *Petitioner,*

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ARGUMENT

I.

THE ISSUE OF THE APPROPRIATE TRIGGER EVENT FOR DETERMINING THE APPLICABILITY OF THE AEDPA TO A CAPITAL CASE INVOLVES A SPLIT IN THE CIRCUIT COURTS AND IS AN IMPORTANT MATTER FOR THIS COURT TO RESOLVE

Contrary to allegations made in Respondent's Brief in Opposition, the issue of the appropriate trigger event for determining the applicability of the Anti-terrorism and Effective Death Penalty Act (AEDPA) is an important issue for this Court to decide in order to resolve a split in the federal circuit courts.

This Court should take this opportunity to correct the Ninth Circuit's erroneous legal analysis in *Calderon v. United States District Court* (*Kelly*), 163 F.3d 530 (9th Cir. 1998) (en

banc). The Ninth Circuit's position is in conflict with all of the other circuit courts to consider the issue. While the impact of the Ninth Circuit's erroneous position affects a finite number of cases, those cases involve significant state capital convictions. The effect of the Ninth Circuit's faulty analysis is amply demonstrated by the result in *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001). The reversal of this state capital conviction could not have occurred if the provisions of AEDPA had been properly applied.

Respondent raises a meritless claim that havoc and chaos will result from the Court's resolution of this issue. Assuming the Court agrees with Petitioner, the cases affected should exist primarily in the Ninth Circuit, since the other circuits with published opinions use an approach consistent with that advocated by Petitioner. An opinion by this Court resolving this split will provide helpful guidance to all other circuits. This Court's opinion would have little, if any, disruption on cases in progress, given the fact that the decisions of the district court are reviewed *de novo* by the circuit court. The circuit court would be able to properly apply the appropriate AEDPA provisions if they were not applied in the district court. There would be no effect on cases already final. On the other hand, if this Court disagreed with Petitioner, the result would be the continuance of the current status quo.

Respondent's argument regarding the propriety of the Ninth Circuit's reasoning in *Kelly* simply mirrors Ninth Circuit's reasoning and demonstrates the split in reasoning between that circuit and every other circuit to consider the issue, including most recently the Eleventh Circuit in *Isaacs v. Head*, 300 F.3d 1232, n.1 (11th Cir. 2002). Petitioner's position is that *Kelly*'s reliance on *Hohn v. United States*, 524 U.S. 236 (1998), and *McFarland v. Scott*, 512 U.S. 849 (1994), is misplaced. These cases simply do not address what constitutes a pending habeas corpus proceeding for purposes of determining the applicability of the AEDPA. *Moore v. Gibson*, 195 F.3d 1152, 1162 (10th Cir. 1999). Similarly, *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) does not support

Respondent's argument. *Slack* is an extension of this Court's analysis in *Hohn*, regarding the effect of the filing of certificates of appealability. It is inapplicable to the present situation for the same reason that *Hohn* is inapplicable.

One argument made in the petition for writ of certiorari was that a request for appointment of counsel and stay of execution do not involve a adversarial proceeding, and, therefore, do not constitute a pending case for determining the application of AEDPA. The concept of "pending case" has been properly construed to require the equivalent of a collateral attack on a criminal judgement, *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999), and "true adversary proceedings," *Kelly*, 163 F.3d at 545, dissenting opinion of Judge Hall. Petitioner continues to take this position.

Respondent asserts that the motion for stay of execution was in fact adversarial because opposition papers were filed. In the present case, Petitioner's counsel filed an opposition to the stay of execution when it appeared that Garceau's counsel failed to comply with the minimal requirements necessary to justify the stay of execution granted. (Appendix to Respondent's Brief in Opposition, at 215-24.) The deficiencies were immediately addressed and the stay continued in place. (Appendix to Respondent's Brief in Opposition, at 234-41.) Later, Petitioner's counsel filed a document entitled, "Opposition to Temporary Stay" which agreed with the requested temporary stay but asked that no future extension be granted due to a lack of extraordinary circumstances. (Appendix to Respondent's Brief in Opposition, at 248-54.) The nature of these filings did not transform the stay of execution proceedings into an adversarial proceeding.

II.

THIS COURT SHOULD ADDRESS THE *TEAGUE* ISSUE AND RESOLVE THE SPLIT IN THE CIRCUITS

Respondent's petition for writ of certiorari clearly states that where an issue under *Teague v. Lane*, 489 U.S. 288 (1989) has not been raised by the prosecution, its application is discretionary. In the present case, Respondent did not assert *Teague* until the filing of the petition for rehearing and petition for writ of certiorari. However, it is Respondent's position that the circumstances which existed in *Garceau* require a different analysis. In this case, the federal court was expressly on notice of *Teague*'s application from sources other than the prosecution, yet chose to ignore it. The result was the application of a new rule of law which resulted in the reversal of a capital conviction. Respondent asks this Court to find that, under such circumstances, it was an abuse of discretion for the Ninth Circuit to fail to address *Teague* as a threshold matter.

Respondent also notes *Horn v. Banks*, ___ U.S. ___, 122 S.Ct. 2147 (U.S. June 2002). Horn involved a situation in which *Teague* was properly raised by the prosecution, and so the specific issue in question was not addressed. However, this case speaks to the continued vitality and importance of *Teague*. It is the importance of *Teague* that causes the government to assert that the Ninth Circuit was not free to acknowledge the existence of *Teague* in its opinion, create and apply a new rule of law, fail to address *Teague*, and then reverse a state capital conviction. The court's reasoned decision to ignore the requirements of *Teague* constitutes an abuse of discretion.

The Ninth Circuit's failure to address *Teague* under these circumstances is in conflict with the Fifth Circuit's approach in *Jackson v. Johnson*, 217 F.3d 360, 361-62 (5th Cir. 2000). As that case stated, *Teague* should be applied "absent a compelling, competing interest of justice in a particular case . . . ." The *Jackson* approach to *Teague* should be adopted by this Court.

Lastly, the *Teague* issue is now properly before this Court. It has not been waived as asserted by Respondent. The circumstances present in this case are compelling. The federal court announced a new rule of law and applied it to overturn a state capital conviction. The California Supreme Court, applied existing precedent and found harmless error. The state conviction deserves to be upheld by the federal court. The Court should grant this petition for writ of certiorari and apply the principles of *Teague* to uphold the Court's good faith application of existing law.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: September 23, 2002.

Respectfully submitted,

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